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No. _____

In The Supreme Court of the United States

PATRICK RUGIERO,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and DEPARTMENT OF TREASURY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

David I. Schoen
Counsel of Record
LAW OFFICE OF DAVID I. SCHOEN
2800 Zelda Road, Suite 100-6
Montgomery, Alabama 36101
(334) 395-6611

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4619 • (800) 856-4619 • Fax: (804) 644-3660 • www.thelexgroup.com

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QUESTION PRESENTED

A Sixth Circuit panel declined to remand Petitioner's FOIA case to the district court for in camera inspection of selected, contested documents and/or expand the record relative to Petitioner's claim of bad faith on the part of the Government in the FOIA litigation, the underlying criminal prosecution, and the parallel discovery proceedings in the context of a motion under 28 U.S.C. §2255. The Sixth Circuit panel determined that Petitioner had not made a strong enough showing of agency bad faith to warrant remand to the district court.

Question: Did the Sixth Circuit err in determining that Petitioner had not demonstrated strong evidence of Government agency "bad faith" - a term with no precise definition or criteria - to warrant remand for an in camera inspection and/or expansion of the record in the context of a claim under the Freedom of Information Act, 5 U.S.C. §552, *et seq.*?

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PETITION FOR A WRIT OF CERTIORARI

Patrick Rugiero, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming a district court's denial of relief on Rugiero's Complaint filed under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, *et seq.*

OPINIONS BELOW

The opinion supporting the judgment presented for review is from the United States Court of Appeals for the Sixth Circuit and is reported as Rugiero v. U.S. Department of Justice, 257 F.3d 534 (6th Cir. 2001), and reprinted at App. 1-26 . Panel Rehearing was denied on September 7, 2001. (App. 49) The opinions of the district court denying relief are reported as Rugiero v. U.S. Department of Justice, 35 F. Supp 977 (E.D. Mich. 1998), reprinted at App. 30-48 and Rugiero v. U.S. Department of Justice, 1999 U.S. Dist. LEXIS 4528, reprinted at App. 27-29.

JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on July 12, 2001 and denied Rugiero's timely application for rehearing on September 7, 2001. Rugiero invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:

"No person shall

> ...be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V.

"No state shall

> ...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV.

STATEMENT OF THE CASE

In June of 1992, Patrick Rugiero was convicted in a narcotics conspiracy in the Eastern District of Michigan following a jury trial before Judge Paul V. Gadola. Mr. Rugiero was represented pre-trial, at trial, post-trial, at sentencing, and on appeal by Detroit attorney N.C. Deday Larene.

On March 22, 1994, the Sixth Circuit Court of Appeals affirmed Mr. Rugiero's conviction in a 2 to 1 decision, with a scathing dissent by Chief Judge Merritt. See, United States v. Rugiero, 20 F.3d 1387, 1395 (6th Cir. 1994). On May 5, 1994, rehearing and rehearing en banc were denied, with Chief Judge Merritt again noting his disagreement. See, United States v. Rugiero, 1994 U.S. App. LEXIS 11554 (6th Cir. May 5, 1994). On October 3, 1994, this Court denied Mr. Rugiero's petition for a Writ of Certiorari. See, Rugiero v. United States, 513 U.S. 878, 115 S.Ct 208, 130 L.Ed.2d 137 (1994).

A number of significant irregularities attended Mr. Rugiero's trial. One of the irregularities was the subject of Chief Judge Merritt's dissenting opinion. Chief Judge Merritt wrote that he would have reversed Mr. Rugiero's conviction because of the prosecutor's gross violation of the sequestration rule in the case. Government counsel intentionally had one of the governr ent's witnesses sit in the courtroom during the trial, in violation of the sequestration rule, and then staged a confrontation and conversation between this witness and the witness who was testifying while this witness was in the courtroom. The clear purpose of this action was to get this witness to testify in a manner that was consistent with the witness then testifying on the stand. United States v. Rugiero, 20 F.3d 1387, 1395 (6th Cir. 1994) (Merritt, C.J., dissenting).

Another major irregularity arose at trial when, during the jury's deliberations, a television news station reported that Mr. Rugiero's trial attorney, N.C. Deday Larene, had ties to organized crime and was going to be indicted. During individual voir dire, most of the jurors indicated that they had seen the television news leak and that the foreman of the jury had discussed the broadcast with other jurors. Rugiero, 20 F.3d at 1390. At around the same time, the trial court received a note from a juror indicating bias or partiality within the jury. That note eventually was "withdrawn" and the jury proceeded to render its verdict. Id.

The incident in connection with the television news leak was the first that Mr. Rugiero learned about suspicions concerning his attorney's direct involvement with criminal conduct. At no time did the trial court make further inquiry about the substance of the matter. The attorney, Larene, was indicted in the Eastern District of Michigan soon after the close of Mr. Rugiero's trial. Nevertheless, he continued to represent Mr. Rugiero for all purposes during all of the ensuing proceedings before the trial court and before the Court of Appeals. At not time was a hearing ever conducted in any forum to advise Mr. Rugiero about the

conflict of interest that arose from his lawyer's indictment by the same prosecuting authority that was prosecuting Mr. Rugiero. Similarly, at no time was Mr. Rugiero ever advised by any court of the possible ramifications of such a conflict of interest.

It has been ascertained through pending litigation under 28 U.S.C. §2255, that even the prosecutor who tried Mr. Rugiero's case, AUSA Richard Delonis, was aware of the conflict; but the U.S. Attorney's office for the Eastern District of Michigan made an affirmative decision to withhold this information until after Mr. Rugiero's trial. In contrast, the same prosecutorial office conspicuously advised every other client Mr. Larene represented during this time period about the conflict and requested that every other judge conduct an "on the record" conflict hearing before letting Larene represent any other defendant.

Pursuing the matter on his own over the next couple of years, Mr. Rugiero learned that his attorney, Mr. Larene, had been the object of a massive criminal investigation by several government agencies all during the pre-trial investigation and preparation phase of Mr. Rugiero's case and during the trial itself. Indeed, he learned that Larene had retained counsel of his own and had been engaged in a vigorous effort for many months preceding and during the Rugiero trial to try by all means possible to stave off his own indictment.[1] This was at the very time that Larene's attention and efforts were to have been devoted to Mr. Rugiero's defense.

Eventually, Larene was indicted along with Vito Giacalone, the reputed mafia boss of the organized crime family which allegedly has dominated the Detroit area for many years. Larene and his attorneys negotiated a plea agreement and he eventually pled guilty, was sentenced to a term of imprisonment, and lost his license to practice law. Mr. Rugiero had been unaware of the investigation into his

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1 Larene was represented by two Washington attorneys from the law firm of Williams and Connolly; Gerald Feffer and Steven A. Steinbach, in addition to local counsel Robert Morgan, Esquire.

attorney's affairs until the "news leak" surfaced during his trial and, even then, he had no idea of the extent of the government's investigation and suspicions concerning Larene; nor did he have any idea of Larene's efforts on his own behalf, undertaken at the very time his attention was supposed to be devoted to zealously defending Mr. Rugiero.

Mr. Rugiero's discoveries led him, on October 28, 1996, to file a motion in the Eastern District of Michigan, pursuant to 28 U.S.C. §2255, seeking to vacate or set aside his judgment of conviction and sentence based on, inter alia, the denial of his Sixth Amendment right to the effective assistance of counsel. The case was assigned to Judge Paul V. Gadola, who referred it to Magistrate Judge Steven D. Pepe.

That motion has now been pending before the District Court for over five years and has been the subject of over twenty (20) hearings and repeated orders compelling discovery compliance, all required because of the government's unrelenting efforts to obstruct the discovery process and deny Mr. Rugiero any and all documents which relate to his case and to the investigation of Deday Larene, which we now know the government intentionally concealed from Mr. Rugiero until the end of his trial. The pattern of government misconduct and bad faith that characterized the criminal trial has been overwhelmingly continued and expanded upon in the related §2255 proceedings, all designed to thwart Mr. Rugiero's efforts at uncovering the truth about his lawyer.

The FOIA proceedings, the subject of this action, are now the third forum related to Mr. Rugiero in which the government overwhelmingly has demonstrated its bad faith and unwillingness to come clean regarding Mr. Rugiero. It is exactly this kind of bad faith that requires judicial scrutiny of the government agencies' disclosure and withholding decisions under FOIA.

Just a glimpse at the record at each of the three stages in Mr. Rugiero's case demonstrates without question that the government consistently and overwhelmingly has

proceeded in bad faith in connection with each and every phase of its litigation with Mr. Rugiero - the criminal case, the §2255 litigation, and the FOIA proceedings.

In the criminal case, as noted, government counsel intentionally violated the sequestration order, prompting a scathing rebuke from Chief Judge Merritt and intentionally concealed defense counsel's investigation and prosecution (by the same prosecuting office) until after Mr. Rugiero's trial was completed.

In the §2255 litigation, it is hard to know where to start in describing the omnipresent bad faith by the U.S. Attorney's office - one of the agencies whose FOIA disclosure decisions are at issue in the FOIA litigation. The government constantly and intentionally has actively concealed discoverable documents, and then withheld for months documents and information it already had been ordered to turn over to Mr. Rugiero. It has answered discovery requests disingenuously (if not outright dishonestly), maintained frivolous and untenable legal positions, and has repeatedly misled the court and Mr. Rugiero. One recent and egregious example of the government's bad faith is the following: after claiming for over three (3) years that they (the U.S. Attorney's Office) had lost the Larene files, in November 2000, the Case Agent, in the course of a court ordered deposition, revealed that he had had, all along (in an office adjoining the prosecutor's), two file cabinets full of documents on the Larene investigation and prosecution. Another year has passed, but the government has yet to turn over a single document. The district court's scathing orders have been to no avail. Naturally, such conduct can and will be dealt with in the context of those proceedings, but the conduct is relevant to the presumption of good faith and to the level of blind trust to be accorded to these agencies in the FOIA litigation.

The FOIA Litigation

On June 5, 1995, acting on his own, Petitioner sent Freedom of Information Act requests to various government agencies seeking the disclosure of any and all documents those agencies had, related to him, his investigation, and his prosecution. His primary purposes were to obtain any and all Brady material applicable to him in the files of those agencies and to obtain from those files any and all documents relevant to the conflict of interest under which his defense attorney for his criminal case was operating during his trial preparation period, post-trial, and during the trial period itself, due to the investigation and prosecution of this attorney by the government, through some of these very same agencies. These agencies also had participated in concealing the conflict from Rugiero throughout his trial and never revealed the magnitude and true nature of its investigation against the attorney until unequivocal documents were obtained by court order. They left no question about just how serious this matter was.

Mr. Rugiero was not satisfied with the responses to the FOIA requests that he received from the agencies; accordingly, on July 30, 1997, he timely filed a Complaint for injunctive and declaratory relief in the United States District Court for the Eastern District of Michigan, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552, et seq. He sought the production from the various agencies of documents that were in any way related to him. The case initially was assigned to District Judge John C. O'Meara; however it was later transferred to District Judge Paul V. Gadola as a case related to Mr. Rugiero's criminal case and his pending case under 28 U.S.C. §2255.

Judge Gadola sat on Mr. Rugiero's criminal case[2] and currently is presiding over Mr. Rugiero's motion to vacate or set aside his sentence under 28 U.S.C. §2255.[3]

On September 9, 1997, the defendants filed their Answers, amending them on October 15, 1997. On February 18, 1998, the defendants filed motions for summary judgment with exhibits. Soon thereafter, Judge O'Meara set the motions down for a hearing. However, on March 11, 1998, the case was reassigned to Judge Gadola, as noted above.

On June 24, 1998, Mr. Rugiero filed his response to the motions for summary judgment. The defendants filed a reply, and on September 15, 1998, the court heard oral argument on the motions for summary judgment. There was no discovery and no evidentiary hearing.

On September 16, 1998, the district court entered an Order dismissing count III of the Complaint on stipulation of the parties. On October 19, 1998, the court entered an Order granting in part and denying in part the motions for summary judgment and dismissing with prejudice counts I, II, V, VI, VII, VIII, IX, and XI of the Complaint.[4] (App. 30-48)

On October 30, 1998, the Department of Justice filed a motion for reconsideration of that part of Judge Gadola's Order that required production of a document the court had inspected in camera after the agency had insisted on withholding it.

On November 4, 1998, the court stayed its Order on summary judgment, in light of the motion to reconsider and on November 18, 1999, it granted in part the motion to reconsider.

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2 United States v. Rugiero, et al., District Court Case No. 90-80941.

3 Rugiero v. United States, District Court Case No. 96-CV-40376.

4 Rugiero v. U.S. Department of Justice, 35 F. Supp.2d 977 (E.D. Mich. 1998).

The court then granted summary judgment in favor of the government on Count X of the Complaint. On March 9, 1999, the court entered an Order and Judgment dismissing Count IV of the Complaint with prejudice and dismissing the Complaint in its entirety with prejudice. See Rugiero v. Department of Justice, et al., 1999 U.S. Dist. LEXIS 4528 (E.D. Mich. March 9, 1999)(App. 27-29).

On March 22, 1999, Mr. Rugiero filed a motion for reconsideration. On May 7, 1999, Mr. Rugiero timely filed his notice of appeal. On June 7, 1999, the court entered an Order finally denying the motion for reconsideration.

Petitioner then lodged an appeal in the Sixth Circuit. In an Opinion and Order filed July 12, 2001, the Sixth Circuit "affirm[ed] the judgment of the district court in substantial part, reverse[d] in part, and remand[ed] for further proceedings." Rugiero v. U.S. Department of Justice, 257 F.3d 534, 554 (6th Cir. 2001)(App. 1-26). Mr. Rugiero was grateful at least for the limited remand; however, the Sixth Circuit decided not to remand for purposes of further consideration of Petitioner's claim of agency bad faith in the underlying and related proceedings. About that issue, the Sixth Circuit stated, "Rugiero has simply not pointed to **strong** evidence of bad faith that calls into question the district court's decision not to conduct in camera review of responsive documents." Id. at 547 (emphasis added).[5]

Believing that the Sixth Circuit had overlooked his argument for remand to the district court, so that the record could be expanded relative to bad faith, Petitioner timely submitted a motion for panel rehearing, which was denied by the Sixth Circuit on September 7, 2001.

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5 Mr. Rugiero's trial counsel in the FOIA proceedings mistakenly assumed that since the same district judge presided over the related proceedings, the record from the parallel cases would be a part of his FOIA record and so the evidence of bad faith from each proceeding would be before the Court. Clearly that was an error; accordingly, Mr. Rugiero sought a remand for the expansion of the record to put all relevant evidence from the related cases before the Court.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Supreme Court Rules sets forth the character of the reasons that this Court considers with respect to a petition for review on a writ of *certiorari*. Rule 10(a) provides that one relevant consideration is whether a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...." Rule 10(c) suggests that another relevant consideration is whether "...a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court...." This case presents elements which directly fit under both of these sections of Rule 10.

This petition is prompted by the complete lack of both uniformity and definition among the circuits as to what constitutes agency "bad faith" in the context of providing citizens with the information or documents that they seek through the Freedom of Information Act and as to what universe is relevant for the evaluation of the same (i.e. whether the "bad faith" examination should be limited to the agency's conduct in the FOIA proceedings or whether conduct in parallel or related proceedings is relevant as well).

No circuit provides a meaningful definition with clarity of the standards by which "bad faith" is to be measured or defined and, to the extent defining the concept has been attempted, there is great variance among the circuits. Similarly, there is no uniformity as to the relevant universe for examination.

As petitioner discusses hereinbelow, various circuit courts have made reference to agency bad faith (or related terms and expressions) in considering the merits of claims made by litigants in FOIA proceedings. The result from a consideration of all relevant decisions from around the country is that one is left unable to find any guidance with any sense of certainty or uniformity as to what constitutes agency "bad faith" such that greater judicial

scrutiny of the agency's failures to disclose information is required to assist the citizen in his/her quest for information from his/her government. This Court must establish clear and meaningful standards in this area and provide direction on this important matter to resolve the lack of uniformity/consistency and to remove the arbitrariness that presently exists from the lack of meaningful standards.

The lack of clarity and definition leaves litigants, government agencies, and the courts themselves without proper guidance in addressing the issue of agency bad faith in the context of the Freedom of Information Act.

ARGUMENT

The Sixth Circuit determined in this case that Mr. Rugiero had not made a showing of agency bad faith sufficient to warrant remand for in camera inspection of selected documents or remand to expand the record regarding agency bad faith. It arrived at its decision without any specified criteria vis-à-vis what constitutes agency bad faith, let alone "sufficient" or "strong" bad faith. It has modified its earlier decisions by now introducing the amorphous concept of "strong" "bad faith," without more, and this in untenable.

The primary underlying question that this case presents is what a FOIA litigant needs to show to obtain a remand for in camera inspection and/or a remand for expansion of the record based on an allegation of agency bad faith.

In the district court decision underlying this matter the court wrote, regarding Petitioner's claim of agency bad faith, that, "in this case, plaintiff has come forth with no substantial showing of evidence. Without some substantial evidence of the type required by Ingle, and recognized in Jones, this court will decline plaintiff's request to conduct an

in camera review of the documents related to Count 1." Rugiero v. U.S. Department of Justice, 35 F. Supp.2d 977, 983 (E.D. Mich. 1998).

Petitioner's claim that the agencies' bad faith warranted a remand for in camera inspection was premised on two distinct arguments. First, Petitioner argued that there was record evidence in the proceedings below sufficient to warrant a remand to conduct an in camera review. Second, Petitioner argued that if the appellate court determined that the record evidence was insufficient to warrant remand for an in camera review, Petitioner at least had made a sufficiently colorable claim of agency bad faith to warrant a remand to expand the record.

Additionally, in both his initial brief and his reply brief on appeal, Mr. Rugiero requested a remand for the expansion of the record and to give the district judge a chance to have before him all of the evidence of agency bad faith that was available from the parallel and previous related proceedings, but that trial counsel erroneously had assumed were automatically a part of the record because the same district judge presided over all such proceedings.[6]

The Opinion of the Sixth Circuit was silent on the issue of Petitioner's request that the matter be remanded for expansion of the record. Mr. Rugiero argued on rehearing that the Court had overlooked his requests in this regard

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[6] Trial counsel erred both as to the state of the record and as to the district judge's actual familiarity with the record in the related proceedings. He mistakenly thought that the related proceedings automatically would be a part of the record. He also assumed that the district judge was fully familiar with the related §2255 proceedings, where some of the most egregious bad faith had occurred, not knowing that the §2255 case actually had been referred to a magistrate judge and it was that judge who had been forced to conduct over 20 hearings and issue orders of reprimand and compulsion concerning the government's conduct in discovery.

and that rehearing was, therefore, appropriate under Rule 40(a)(2) of the Federal Rules of Appellate Procedure.[7]

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[7] The following are references to Mr. Rugiero's attempts to obtain a remand to the district court for the expansion of the record:

In his Initial Appellate Brief (IAB) Petitioner specifically requested that the matter be remanded to the district court so that the record could be expanded relative to evidence of government bad faith in the underlying and parallel proceedings. Petitioner's requests included:

1. "The record needs further development to highlight the evidence of bad faith from the related parallel and underlying litigation so it can properly be evaluated as this Court instructed in Iones." (IAB at 29, n.12).
2. "...[C]ounsel below assumed that the lower court was familiar with the occurrences in the § 2255 litigation and did not further supplement this record. That is one of the reasons it might be most appropriate to remand this case for further record development." (IAB at 36).
3. "...[T]he record needs further development on remand if it is fully and accurately to reflect the abundant evidence of bad faith in the related proceedings." (IAB at 38).
4. "The Court must remand to the lower court for...development of the record." (IAB at 39).

In the Reply Brief (RB) Petitioner made additional requests for remand for expansion of the record relative to government bad faith in the underlying and related proceedings. These requests included the following:

1. "These affirmative and direct misrepresentations of the record require a remand of this case for supplementation of the record to reflect the record already developed below in the § 2255 litigation." (RB at 7).
2. "It may be, in the end, that the appropriate course for this Court is to remand this case for further development of the record so that all the true facts relevant to the issues herein, and especially the 'bad faith' issue under Iones can be fully presented to the Court in all material regards." (RB at 7-8, p.4).
3. "Mr. Rugiero respectfully suggests a remand for supplementation so that this Court can have all the relevant facts before it." (RB at 9).
4. "The first step must be to remand the case so that the formal record of this case can be supplemented." (RB at 14).
5. "[I]n the trial court the record should be supplemented to first give the district judge a chance to evaluate the claim under Iones with all the relevant evidence in the record, and secondly, to give this Court a chance, if necessary, to evaluate the relevant considerations on a competent record." (RB at 21).

On Petitioner's claim that the appellate record, in its present state, warranted remand for in camera review because of agency bad faith, the Sixth Circuit stated, "Rugiero has simply not pointed to **strong** evidence of bad faith that calls into question the district court's decision not to conduct an in camera review of responsive documents." Rugiero v. U.S. Dept. of Justice, 257 F.3d 534, 547 (6th Cir. 2001).

It is the phrase "not pointed to **strong evidence of bad faith** that calls into question" (emphasis added) that is central to this petition for writ of certiorari. What constitutes "strong evidence of bad faith?"

At the heart of this matter rests the question of what constitutes a sufficient showing of agency bad faith; a showing sufficient to overcome the presumption of good faith accorded government agency affidavits in FOIA proceedings.

In the district court proceedings, the court wrote, "plaintiff has come forth with no substantial showing of such evidence" [referring to "evidence" of agency bad faith]. In the appellate court proceedings the court wrote that "Rugiero has simply not pointed to **strong** evidence of bad faith." (Emphasis added) There do not appear to be any criteria or standards that are enunciated by the various courts to provide guidance to plaintiffs, government agencies, and courts themselves as to what constitutes a sufficient showing of agency bad faith.

This Court and each circuit court of appeals has recognized the inherent imbalance of FOIA and the methods for proceeding that have developed for lack of more efficient alternatives. See e.g., Department of Air Force v. Rose, 425 U.S. 352, 360-61 (1973); United States Dep't of State v. Ray, 502 U.S. 164, 173 (1991).

This imbalance, which gives such great deference to the agency without oversight carries with it the critical need to be able to trust that the agency will fulfill its duties appropriately and with the requisite faithfulness to the presumption of openness that the Act intended and to

which the citizenry is entitled. Id. The imbalance also, therefore, requires clear standards as to when the agency has evinced bad faith with respect to such duties, thereby making appropriate and necessary outside scrutiny, even if limited to in camera sampling inspections which would avoid sacrificing the efficiency of the courts in the mix.

In Ingle v. United States Dept. of Justice, 698 F.2d 259, 265 (6th Cir. 1983), the court held that "The court is entitled to accept the credibility of the affidavits [referring to government agency affidavits in support of the agency's position in FOIA matters] so long as it has no reason to question **the good faith of the agency.**" (Emphasis added). Ingle, however, contains no description of what might constitute an adequate basis for calling into question the presumption of good faith accorded agency affidavits. Under any circumstances, however, Mr. Rugiero certainly adduced ample evidence to cross the first hurdle, raising suspicion (and therefore greater scrutiny); but the Court here then added the element of the strength of the evidence and the sufficiency of the bad faith, without anything more concrete.

In Jones v. F.B.I., 41 F.3d 238 (6th Cir. 1994), the court seemed to have settled the question as to the relevant universe for examining agency bad faith and dealt with the first inquiry as well, setting up the issue in presumption format. The court held that "...agency actions and affidavits are normally entitled to a presumption of good faith. U.S. Department of State v. Ray, 502 U.S. 164, 112 S.Ct 541, 550, 116 L.Ed.2d 526 (1991). This presumption may be overcome where there is evidence of bad faith in the agency's handling of the FOIA request. Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue." Id. at 243. However, in Jones, as with Ingle, the court did not offer any definitions or criteria relative to what would constitute a sufficient showing by a litigant of agency bad faith.

In Allen v. C.I.A., 636 F.2d 1287, 1298 (D.C. Cir. 1980), the court held that "Where there is **evidence of bad faith** on the part of the agency, the representations of the agency **lose all trustworthiness**. In camera inspection in such situations is 'plainly necessary'." (Emphasis added). As with the other opinions, though, the Allen court failed to give any substance to its pronouncements. Allen includes no language which defines "bad faith on the part of the agency," nor does Allen define what is meant by "lose all trustworthiness." In the absence of such definition or criteria, litigants, government agencies, and the courts themselves are left without specific guidance regarding when and where to determine that bad faith has been demonstrated.

In American Friends Service Committee v. Department of Defense, 831 F.2d 441, 444 (3rd Cir. 1987), the court held that "An agency is entitled to summary judgment when the agency's affidavits are not contraverted by either **contrary evidence in the record** nor by **evidence of agency bad faith**. (quoting Abbotts v. Nuclear Regulatory Commission, 766 F.2d 604, 660 (D.C. Cir. 1985))" (Emphasis added).

In Carter v. U.S. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987) the court held that "If there is evidence of **agency bad faith** ...then in camera inspection may be necessary to insure [sic] that agencies do not misuse the FOIA exemptions to conceal non-exempt information." Id. at 393. (Emphasis added). The Carter court went on to note that "Where there is evidence of **bad faith on the part of the agency**...in camera inspection is plainly necessary." Id. at 393. Finally, the Carter court commented that "there must be **tangible evidence of bad faith**." Id. at 393 (emphasis added).

In Lam Lek Chong v. U.S. D.E.A., 929 F.2d 729, 735 (D.C. Cir. 1991) the court held that "In camera inspection may be appropriate...when **evidence of agency bad faith** is before the court." (Emphasis added). In Quinon v. F.B.I., 86 F.3d 1222, 1228 (D.C. Cir. 1996) the court held that "In

camera review may be particularly appropriate when...there is **evidence of bad faith on the part of the agency.**" (Emphasis added).

In Miner v. C.I.A., 88 F.3d 796 (9th Cir. 1996) the court held that "Upon a showing of **agency bad faith**, a court must not accord agency affidavits 'substantial weight.' Instead, a court must review the FOIA request with heightened scrutiny." Id at 803 (Emphasis added).

In Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999), the court held that FOIA petitioner had not made a sufficient showing of agency "bad faith," without giving an adequate clue as to what showing would have been sufficient.

So a variety of circuits (Second, Third, Sixth, Ninth, and the District of Columbia) have used the term "bad faith" relative to FOIA proceedings, but not one of the circuits has given substantive definition to what the term means; nor has any of the circuits offered criteria that should be applied in assessing the presence, or lack of "bad faith." The cases make clear that agency bad faith is relevant; but they do not provide any clarity as to what it is, what is "sufficient" to trigger scrutiny (overcome the presumption of good faith), nor do they uniformly address the question of what is the relevant universe for examination.

Some additional FOIA cases, without using the term "bad faith," have addressed the issue of what a litigant must prove to overcome the presumption of good faith accorded representations made by government agencies and government officials in FOIA cases; but still the issue remains unclear and the cases risk, if not invite, arbitrariness.

In Castaneda v. United States, 757 F.2d 1010, 1012 (9th Cir. 1985) the court held that "Where it appears that the **motives or truthfulness** of the [government official] **are in doubt**, the public need for supervision and disclosure is

necessarily heightened." (Emphasis added). What is the standard for assessing whether or not the "motives or truthfulness" of a government official are "in doubt?"

In Davis v. U.S. Department of Justice, 968 F.2d 1276, 1282 (D.C. Cir. 1992) the court held that, "When governmental misconduct is alleged as the justification for disclosure, the public interest is insubstantial **unless the requester puts forward compelling evidence** that the agency denying the FOIA request is **engaged in illegal activity** and shows that the information sought is necessary in order to confirm or refute that evidence." (Emphasis added). There is no definition of "compelling evidence" nor is there any criteria that specifies what constitutes "illegal activity" that requires a judicial conviction in a court of law of the subject agency. That would be far beyond the pale of what a FOIA petitioner could prove. It is, however, the lack of precision and definition that this Petitioner is attempting to highlight. The amorphous language of the case decisions leaves a litigant unable to define and plan a knowledgeable strategy for prevailing.

In Hunt v. F.B.I., 972 F.2d 286, 289-90 (9th Cir. 1992) the court held that "Where there is no evidence...that there was **wrongdoing on the part of a government employee** the public interest in disclosure is diminished." (Emphasis added). The Hunt court went on to note that "The public interest in ensuring the integrity and the reliability of government investigation procedures is greater where there is **some evidence of wrongdoing** on the part of the government official." (Emphasis added). As with all cases cited above, here too there is no specificity. There is no definition of terms, criteria, or standards. What does "wrongdoing on the part of a government employee" mean? What constitutes "some evidence of wrongdoing?"

In Accuracy in Media v. National Park Service, 194 F.3d 120, 124 (D.C. Cir. 1999), the court held that, "[Litigant] must show **'compelling evidence** that the agency denying the FOIA request is **engaged in illegal activity**, and access to the [sought after information] is necessary in order to

confirm or refute that evidence.' Safecard. 926 F.2d at 1205-06." (Emphasis added). The Accuracy in Media court went on to note, "While we agree that falsification by the agencies would show government illegality - under the present facts, indeed, illegality on a massive scale - there is no persuasive evidence of such falsification, much less compelling evidence." (Emphasis added).

As with all the other cases cited, here too there is no definition of terms; the decisions do not include any criteria or standards to be applied in determining when a litigant's burden of proof is satisfied.

In Favish v. Office of Independent Counsel, 217 F.3d 1168, 1172-73 (9th Cir. 2000), the court held that "nothing in the statutory command conditions agency compliance on the requesting party showing that he has knowledge of misfeasance by the agency, although at times such knowledge has been referred to as enhancing the urgency of the request." (Emphasis added). What constitutes "knowledge of misfeasance by the agency?"

In Castaneda, supra ("motives or truthfulness...are in doubt"); David, supra ("requester puts forward compelling evidence that agency...is engaged in illegal activity"); Hunt, supra ("wrongdoing on the part of a government employee" and "some evidence of wrongdoing"); and Accuracy in Media, supra ("compelling evidence that the agency...is engaged in illegal activity"); the courts have used language that suggests certain standards that must be satisfied by a litigant seeking a determination that the presumption of good faith usually accorded government agencies must be set aside, and government affidavits must be examined with a far higher degree of scrutiny. However, the suggestion of standards is not followed by a definition or description of such standards.

CONCLUSION

In Department of Justice v. Reporter's Committee for Freedom of the Press, 489 U.S. 749, 109 S.Ct 1468, 103 L.Ed.2d 744 (1989) (quoting Department of the Air Force v. Rose, 425 U.S. 352, 272, 96 S.Ct 1592, 48 L.Ed.2d 11 (1976)), the Supreme court gave concise definition to the purpose of the Freedom of Information Act (FOIA) when it wrote, "The basic purpose of the Freedom of Information Act is to 'open agency action to the light of public scrutiny'." 489 U.S. at 772. In N.L.R.B. v. Robbins Tire and Rubber Co., 437 U.S. 214, 98 S.Ct 2311, 57 L.Ed.2d 159 (1978), the Supreme Court held that "The basic purpose of the FOIA is to insure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." 437 U.S. at 242. In Sinito v. U.S. Department of Justice, 176 F.3d 512, 514 (D.C. Cir. 1999), the court recited two primary sources of the FOIA and added an observation of its own. The Sinito court quoted the 120 Cong. Rec. 17,038 (1974) (Statement of Senator Weicker) to the effect that "none of the abuses [by government officials] that we have seen come out of this system would have happened if more people, more eyes, more ears, had been on the scene." The Sinito court went on to cite H.R. Rep. No. 89-1497, reprinted in 1966 U.S.C.C.A.N. 2418, 2419 thusly: "The FOIA was enacted because 'the weed of improper secrecy had been permitted to blossom and was choking out the basic right to know.'" The Sinito court concluded its recitation of some of the history of the FOIA by noting, "one of [FOIA's] paramount goals...is to deter secrecy in government and the corruption it can breed."

How then are the purposes of FOIA, as recited by the Supreme Court and reflected upon by the Sinito court, to be achieved where there exist allegations of agency bad faith?

How is a litigant to approach meeting his/her burden of proof in the context of allegations of agency bad faith when the comments of various and numerous federal appellate courts are devoid of criteria or standards for determining agency bad faith?

It is those questions that Petitioner seeks answers in this petition for writ of certiorari.

Respectfully Submitted,

Patrick Rugiero
By Counsel

David I. Schoen
Counsel of Record
2800 Zelda Road, Suite 100-6
Montgomery, Alabama 36101
(334) 395-6611

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Case No. 99-1608

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Patrick Rugiero,
Plaintiff-Appellant,

v.

United States Department of Justice;
Department of Treasury,
Defendants-Appellees.

Argued: November 2, 2000
Decided and Filed: July 12, 2001
[Entered: July 12, 2001]

Before: KRUPANSKY, BATCHELDER, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: David I. Schoen, Montgomery, Alabama, for Appellant. William L. Woodard, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellees.

ON BRIEF: David I. Schoen, Montgomery, Alabama, for Appellant. William L. Woodard, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellees.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Patrick Rugiero filed requests with eleven components of the United States Departments of Justice and Treasury under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or "Act"), for information regarding himself. Unsatisfied with the responses he received, Rugiero filed a complaint seeking declaratory and injunctive relief against all eleven divisions. Prior to commencement of discovery, the defendants filed motions for summary judgment, which the district court granted as to most of the defendant components. *Rugiero v. United States Dep't of Justice*, 35 F. Supp. 2d 977 (E.D. Mich. 1998). When those remaining processed Rugiero's FOIA request or released particular documents, the district court dismissed these defendants. Rugiero moved for reconsideration, but the district court denied the motion as untimely. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Statement of Facts

A. Rugiero's Trial and Conviction

On June 19, 1992, a jury convicted Rugiero of distributing cocaine and conspiracy to distribute, or possess with intent to distribute, cocaine and heroin, but returned a verdict of not guilty to charges of distributing heroin, intimidating a witness, and using a firearm during a violent crime. *United States v. Rugiero*, 804 F. Supp. 925, 928 (E.D. Mich. 1992). On the evening following submission of the case to the jury, local news broadcasts identified Rugiero's defense counsel, N.C. Deday LaRene, as the target of a federal criminal investigation for his alleged ties to

organized crime figures. Two days later, a juror passed a note to the court expressing concern about the deliberations. Shortly thereafter, the jury indicated that it had reached a verdict, and the juror who authored the first note sent a second note to the court asking that the first note be disregarded. After receiving the verdicts, the court polled each juror individually and assured itself that, although several jurors had seen or heard about the news report, outside prejudicial information did not influence the verdicts.

The district court denied Rugiero's motion for a new trial based on the prejudice resulting from outside influences on the jury. *Id.* at 931. We affirmed the conviction on appeal. *United States v. Rugiero*, 20 F.3d 1387 (6th Cir.) (2-1 decision), *cert. denied*, 513 U.S. 878 (1994). LaRene represented Rugiero in all phases of his criminal trial and appeal, and Rugiero claims that during the course of his criminal trial he never knew--and that the government withheld from him information--that the federal government was preparing to indict LaRene. Viewing his attorney's impending indictment as a conflict of interest that prejudiced his defense at trial and on appeal, Rugiero has filed an action under 28 U.S.C. § 2255 seeking to set aside his conviction. Frustrated by the government's purported obfuscation of his requests for discovery and alleged misconduct in the section 2255 proceeding, Rugiero turned to the FOIA as an alternative means of learning information to use in his efforts to set aside his conviction. The same district court judge has presided over all of these actions, the criminal trial, the section 2255 action, and this FOIA case.

B. Rugiero's FOIA Requests

The complaint in this case identifies the eleven components from which Rugiero requested records in separate counts. The following defendants figure prominently in the discussion in this appeal: the Executive Office of the United States Attorneys ("EOUSA") named in Count IV; the United States Secret Service ("USSS"); the Internal Revenue Service ("IRS"); the Tax Division of the Department of Justice ("DOJ Tax"); and the Drug Enforcement Agency ("DEA") named in Count XI.

Rugiero requested, pursuant to the FOIA, "a copy of any and all records, documents and any type of information that your agency has or had in its possession that is in any way connected to, related to or even remote [sic] in reference to my name." Each defendant responded to the request by searching its records, which resulted in production of over one thousand pages of responsive documents in total, with the vast majority withheld in full or in part pursuant to claims of statutory exemption under the Act. Three defendants, the USSS, IRS, and DOJ Tax, located no responsive documents.

The EOUSA, United States Marshals Service, and the DEA each conducted additional searches either at the administrative appeals level or in response to this suit and identified new documents subject to disclosure in response to Rugiero's FOIA request. The IRS asked Rugiero to narrow the scope of his request, and he identified all "Criminal Investigation Division records that may have been compiled between the years 1984 and 1993 inclusive" as the object of his FOIA query.

During the district court proceedings, DOJ Tax maintained that it never received Rugiero's FOIA request. *Rugiero*, 35 F. Supp. 2d at 986. When Rugiero produced a copy of it, however, the district court ordered DOJ Tax to

process the request immediately. *Id.* Once DOJ Tax complied, the district court granted the division's motion for summary judgment.

Also, Rugiero contested the EOUSA's withholding of several specific documents. Document 2 is a letter from the federal prosecutor in Rugiero's criminal case to LaRene regarding intimidating conduct and threats directed at jurors and other third parties associated with Rugiero's criminal trial. Because the document had already been disclosed to Rugiero's defense counsel, the district court ordered the EOUSA to release the document in its entirety to Rugiero, *id.* at 984, though the court later modified this order to redact the names of jurors and third parties. The district judge conducted an *in camera* review of Document 3, a letter from a federal prosecutor to an FBI agent regarding jury tampering in Rugiero's criminal case, Document 5, a document on which the United States Probation Department relied in preparing Rugiero's presentence report, and Documents 9 and 10, allegedly containing correspondence between a federal prosecutor and third parties regarding the investigation of LaRene. *Id.* at 984-85. Upon review, the court declined to order the EOUSA to produce any of these documents. *Id.*

II. Standard of Review

An agency's denial of a FOIA request is reviewed by a district court de novo. 5 U.S.C. § 552(a)(4)(B). Similarly, this court reviews the propriety of a district court's grant of summary judgment in a FOIA proceeding de novo. *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1078 (6th Cir. 1998) (citing *Detroit Free Press, Inc. v. Department of Justice*, 73 F.3d 93, 95 (6th Cir. 1996)). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for

summary judgment, the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To prevail, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. Applicable Provisions of the FOIA

The FOIA generally provides that every federal agency shall promptly make available upon request records reasonably described. 5 U.S.C. § 552(a)(3)(A). Under the Act, an agency may not withhold or limit the availability of any record, unless one of the FOIA's specific exceptions applies. *Id.* § 522(d). These exceptions are to be narrowly construed, *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1065 (2001) (quoting *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)), and the burden is on the agency to justify its action. 5 U.S.C. § 552(a)(4)(B). Therefore, the structure of the Act reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quotation omitted).

To ensure the breadth of disclosure, the Act authorizes courts to examine documents *in camera* when reviewing the propriety of an agency's withholdings. 5 U.S.C. § 552(a)(4)(B). *In camera* review is a discretionary measure taken after consideration of: (1) judicial economy;

(2) actual agency bad faith, either in the FOIA action or in the underlying activities that generated the records requested; (3) strong public interest; and (4) whether the parties request *in camera* review. *Ingle v. Department of Justice*, 698 F.2d 259, 267 (6th Cir. 1983), *overruled on other grounds by United States Dep't of Justice v. Landano*, 508 U.S. 165 (1993). This circuit, however, encourages use of *in camera* review sparingly, when no other procedure allows review of the agency's response to a FOIA request. *Id.*

Procedurally, district courts typically dispose of FOIA cases on summary judgment before a plaintiff can conduct discovery. *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994). This posture creates a situation in which a plaintiff must argue that the agency's withholdings exceed the scope of the statute, although only the agency is in a position to know whether it has complied with the FOIA unless the court reviews a potentially massive number of documents *in camera*. *Id.* One means developed to address this situation is the use of a "Vaughn index," a routine device through which the agency describes the documents responsive to a FOIA request and indicates the reasons for redactions or withholdings in sufficient detail to allow a court to make an independent assessment of the claims for exemptions from disclosure under the Act. *Id.* at 241-42; *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Ordinarily, the agency may justify its claims of exemption through detailed affidavits, which are entitled to a presumption of good faith. *Jones*, 41 F.3d at 242 (citing *United States Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)). Evidence of bad faith on the part of the agency can overcome this presumption, even when the bad faith concerns the underlying activities that generated the FOIA request rather than the agency's conduct in the FOIA action itself. *Id.* at 242-43. Unless evidence contradicts the government's affidavits or establishes bad faith, the court's primary role is to review the adequacy of the affidavits and other evidence. *Ingle*, 698 F.2d at 265 (quoting *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1312 (8th Cir. 1978));

Silets v. United States Dep't of Justice, 945 F.2d 227, 231 (7th Cir. 1991) (citing *Kimberlin v. Department of Treasury*, 774 F.2d 204 (7th Cir. 1985)). "If the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the government's position." *Ingle*, 698 F.2d at 265 (quoting *Cox*, 576 F.2d at 1312).

IV. Bad Faith

Rugiero's most insistent argument is that evidence of the government's bad faith in this FOIA action, the parallel section 2255 proceeding, and the underlying criminal conviction militate in favor of *in camera* review of at least a random sample of the documents responsive to his FOIA requests. A showing of bad faith would rebut the presumption of regularity the government enjoys in responding to FOIA requests, *Jones*, 41 F.3d at 242, and would weigh heavily in the decision to conduct an *in camera* review of responsive documents withheld or redacted. *Ingle*, 698 F.2d at 267.

Rugiero offers the saga of Document 2 as the best example of bad faith in these FOIA proceedings. The EOUSA's Vaughn index describes the document as "[c]orrespondence from AUSA to attorneys re: jury tampering" and indicates that its contents involve "discussions with jurors, third party individuals, and threats, intimidating conduct directed at and reported by several jurors in course of Rugiero prosecution." Pursuant to 5 U.S.C. § 552(b)(6) and (7)(C), the EOUSA initially withheld the entire document. *Rugiero*, 35 F. Supp. 2d at 984. Noting that a copy of the letter had been sent to LaRene, the district court ordered the document released in its entirety to Rugiero. *Id.* Later, the court reconsidered and allowed the EOUSA to redact the names of individuals in the letter. Disputing the characterization of the contents of the letter, Rugiero invites us to review its contents. In relevant part,

the correspondence redacted pursuant to 5 U.S.C. § 552(b)(7)(C) describes a discussion a prosecutor had with jurors following the criminal trial:

> Having talked to juror [7C], I made a general inquiry of the several jurors who were still present, asking them if they had encountered any unusual events during the course of the trial. Juror [7C] said that, on one occasion, [7C] noted a [7C] colored vehicle driving slowly down [7C] block as if the driver were searching for an address, but that event had no impact upon [7C's] role as a juror. Additionally, juror [7C] advised that in travelling home after court one day, a car which [7C] believed to be occupied by [7C] [7C] on the freeway. While that event bothered [7C], it did not preclude [7C] from deciding the case solely upon the evidence and, in fact, finding [one of Rugiero's co-defendants] not guilty. No other jurors reported any unusual events occurring to them during the course of the trial. I did hear later, however, that some of the jurors were disturbed by the fact that an investigator, apparently retained by the defense, had contacted or tried to make contact with them.

In response to Rugiero's motion for reconsideration of the order allowing the EOUSA to redact portions of this letter, the district court concluded that "the document can fairly be read to contain exactly the information DOJ and EOUSA indicated that the document contained." We agree. Though the document nowhere uses the words "threat" or "intimidation," from the perspective of the jurors involved, this characterization is fair. More importantly, the description of the document in the Vaughn index appears accurate. Although Rugiero expresses outrage that the

EOUSA has redacted portions of a document already released to his attorney, we have clearly held that no diminution of privacy interests occurs despite the fact that the identifying information is already publicly available. *Abraham & Rose*, 138 F.3d at 1083. Therefore, these redactions were proper, and upon inspection Rugiero's prime example of bad faith on the part of the government in this proceeding amounts to nothing more than proper application of the law.

With regard to bad faith elsewhere in this action, the district court specifically found that Rugiero had failed to offer any such evidence with respect to the defendants that identified responsive documents, except the EOUSA. *Rugiero*, 35 F. Supp. 2d at 983, 985. These findings provided the basis for the district judge's refusal to review the documents *in camera*. *Id.* Although he failed to make a similar finding explicitly with regard to the other defendants, their lack of bad faith is readily discernible. Because the USSS, IRS, and DOJ Tax found no responsive documents and DOJ Tax required prodding from the district court to conduct its search, Rugiero constructs an argument of bad faith dependent on the adequacy of these defendants' searches. Yet even an inadequate search does not necessarily imply bad faith, and the record lacks any evidence supporting Rugiero's argument that the USSS, IRS, or DOJ Tax acted in bad faith in responding to the FOIA requests. With respect to the EOUSA, the district judge reviewed several documents, in addition to Document 2, *in camera*. That review resulted in no action other than the modified order producing Document 2 with redactions. Rugiero contends that, since the EOUSA initially sought to withhold Document 2 in its entirety, the district court's release of the document should trigger heightened scrutiny of others. This argument overlooks the *in camera* review of the other documents from which the district court concluded that the EOUSA properly withheld materials Rugiero sought to have released. Moreover, one instance of failing to release a

record–without more–does not constitute bad faith, especially when as here the agency has processed a voluminous body of responsive documents.

Rugiero also contends that bad faith in the section 2255 proceeding and his criminal trial obligated the district court to conduct an *in camera* review of the responsive documents. With respect to the section 2255 action, the parties argue whether the government has played a "shell game" by telling Rugiero there that he can obtain documents for the collateral challenge to his conviction in this FOIA action while saying here that he can receive material through discovery in the section 2255 proceeding. Regarding the criminal trial, the parties debate whether the failure to disclose LaRene's then-impending indictment constituted bad faith. Relying on the line of cases originating in *Holloway v. Arkansas*, 435 U.S. 475 (1978) (holding that an attorney's conflict of interest gives rise to a claim of ineffective assistance of counsel under the Sixth Amendment and establishes prejudice per se), *see also Riggs v. United States*, 209 F.3d 828, 831-32 & n.1 (6th Cir. 2000), Rugiero maintains that the collateral nature of bad faith in FOIA proceedings under *Jones* obligated the district judge to conduct an *in camera* review of redacted and withheld responsive documents.

We express no opinion on the merits of Rugiero's argument that he suffered a deprivation of his Sixth Amendment rights. That question is the subject of the section 2255 action and is not properly before us. We do believe, however, that Rugiero misunderstands our discussion of bad faith in *Jones*. There, the FBI had targeted the leader of a black nationalist group as a part of its now infamous COINTELPRO program and played a role in the prosecution of Jones for the murder of two police officers. Jones used documents obtained from the FBI through FOIA requests to secure his release through the issuance of a writ of habeas corpus and subsequently filed suit under the FOIA to compel release of withheld material. Although an

agency's processing of a FOIA request ordinarily enjoys a presumption of good faith, we noted that "[e]ven where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue." *Jones*, 41 F.3d at 242. Later, we quoted *Ingle v. Department of Justice* for examples of the type of bad faith that might lead a district court to conduct an *in camera* review: "where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would *publicly embarrass* the agency or that a so-called '*cover up*' is presented, government affidavits lose credibility." *Jones*, 41 F.3d at 243 (quoting *Ingle*, 698 F.2d at 267) (emphasis added).

Employing this standard, we concluded that *Jones* presented a clear case of bad faith warranting *in camera* review because the nature of the FBI's COINTELPRO investigation went beyond the ordinary detection and prevention of criminal activity to well-documented infringements of civil liberties whose disclosure threatened public embarrassment of the FBI. *Id.* In reaching this conclusion, we recognized that *Jones* presented an unusual case and defined the collateral nature of bad faith in FOIA actions according to a very high standard that would infrequently be met. *Id.* ("[T]he courts of this circuit should not process this case in the same manner as they would a request for documents regarding a routine FBI investigation.").

We think that the public controversy surrounding COINTELPRO and the FBI's direct role in securing a tainted conviction in *Jones* suffices to distinguish Rugiero's case, which falls much closer to a "routine investigation" and prosecution entitled to a presumption of good faith. While we do not condone the withholding of a possible conflict of interest from the district court, Rugiero has simply not pointed to strong evidence of bad faith that calls into question the district court's decision not to conduct an *in*

camera review of responsive documents. To the extent that Rugiero has sought to use the FOIA to aid his section 2255 action, we repeat that "a FOIA request is not a substitute for the normal process of discovery in civil and criminal cases." *Jones*, 41 F.3d at 250 (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989), and *Irons v. Bell*, 596 F.2d 468, 475 & n.15 (1st Cir. 1979)).

V. Adequacy of Searches for Responsive Documents

Rugiero next claims that the district court erred in not evaluating the adequacy of the searches conducted in response to his FOIA requests. His brief focuses on the searches conducted by the IRS, USSS, and DOJ Tax, all of which found no documents responsive to his request.

In response to a FOIA request, an agency must make a good faith effort to conduct a search for the requested records using methods reasonably expected to produce the requested information. *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). The FOIA requires a reasonable search tailored to the nature of the request. *Id.* at 28. At all times the burden is on the agency to establish the adequacy of its search. *Patterson v. IRS*, 56 F.3d 832, 840 (7th Cir. 1995); *Steinberg v. United States Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). In discharging this burden, the agency may rely on affidavits or declarations that provide reasonable detail of the scope of the search. *Bennett v. DEA*, 55 F. Supp. 2d 36, 39 (D.D.C. 1999) (citing *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982)). "In the absence of countervailing evidence or apparent inconsistency of proof, [such affidavits] will suffice to demonstrate compliance with the obligations imposed by the FOIA." *Id.* The question focuses on the agency's search, not on whether additional documents exist that might satisfy the request. *Steinberg*, 23 F.3d at 551 (quoting *Weisberg*, 745 F.2d at 1485).

After outlining the basic structure of the agency's Master Central Index computer system, the declaration from the USSS indicates that three individuals searched the agency's computer system on three separate occasions from three different offices. Each of these searches looked for documents by name, date of birth, and social security number. This search appears to be the model of responsiveness under the FOIA. Rugiero contends, however, that the USSS cannot possibly have no documents pertaining to him since an agent testified at his trial. The declaration of the agency responds that the agent who testified maintained no paper files relative to him and had minimal contacts with Rugiero since another agency conducted the investigation. Because our legal standard focuses on the adequacy of the search, not the chance that additional responsive documents exist, *id.*, summary judgment for the USSS was appropriate.

With regard to the IRS, the declaration outlined operation of its Integrated Data Retrieval System and stated that Rugiero's request for documents pertaining to himself within the Criminal Investigation Division compiled between 1984 and 1993 inclusive was processed twice, each time seeking to identify files with Rugiero's social security number. Rugiero again protests that the IRS must have records on him since the agency introduced his tax returns at his criminal trial. The Criminal Investigation Division, however, investigates violations of the criminal provisions of Title 26. Rugiero did not face such charges at his criminal trial. Moreover, the district court harmonized the introduction of tax records and the lack of responsive documents at the oral arguments on defendants' motions for summary judgment:

> [I]n a drug case when the tax returns are introduced, it's not necessarily because there's any charge, of course, of tax evasion, but usually it's introduced to produce some evidence from which the jury could infer that the individual has some . . . illicit source of income that he's not disclosed on the tax returns because his lifestyle far exceeds what's shown on the tax return. That arises fairly often in drug cases.

Additionally, Rugiero questions the good faith of the IRS in responding to his request since the agency required him to narrow his search before processing it. The FOIA requires that a request "reasonably describe" the documents sought. 5 U.S.C. § 552(a)(3)(A). Accordingly, a request to narrow the scope of a search is entirely permissible under the Act. When the IRS asked Rugiero to narrow his request, the agency provided an overview of the types of records its divisions could be expected to have. Again, the focus is on the adequacy of the search, and there is no indication that the IRS failed to conduct an adequate search for the records requested. Therefore, summary judgment for the IRS was proper. Rugiero remains free, of course, to submit FOIA requests to other divisions within the IRS.

Finally, Rugiero challenges the adequacy of the search conducted by DOJ Tax, which initially maintained it had never received a FOIA request from Rugiero and only conducted its search when ordered to do so by the district court. The only file identified in the search related to this FOIA request, and no records relating to a criminal investigation of Rugiero were found. Because the declaration submitted by DOJ Tax fails to describe the methods of its search and states simply that the agency searched its "indices," this response to Rugiero's FOIA requests verges on the impermissibly conclusory. *Bennett*, 55 F. Supp. 2d at 40 ("An affidavit must give reasonable detail

of the scope of the search in order to satisfy the agency's burden of proof; simply stating that 'any and all records' were searched is insufficient."). The declaration does state that DOJ Tax maintains its files by the name of the subject of an investigation, so whatever files the agency searched in response to Rugiero's request would have turned up any documents if he were the target of an investigation. Of course, Rugiero requested all documents relating to him, not just those pertaining to an investigation of himself, and DOJ Tax has not given any indication that it conducted this broader search. Our inquiry focuses on the reasonableness of the search, not the potential existence of additional responsive documents. *Steinberg*, 23 F.3d at 551 (quoting *Weisberg*, 745 F.2d at 1485). We think that DOJ Tax conducted a reasonable search in response to Rugiero's FOIA request and that the declaration demonstrates compliance with the obligations the Act imposes on the agency. Therefore, since the record lacks any countervailing evidence, the district court properly granted summary judgment.

VI. Exemptions from Disclosure

A. Relevant Exemptions under the FOIA

Defendants have invoked five of the FOIA's exceptions in withholding in full or in part materials released in response to Rugiero's requests. First, section 552(b)(2) exempts records "related solely to the internal personnel rules and practices of an agency." This court employs a two-prong test developed in other circuits to determine the applicability of this exception. *Abraham & Rose*, 138 F.3d at 1080. The agency must show that the requested information it seeks to withhold relates predominantly to an agency's rules and practices for personnel. *Id.* The agency must further show that the public has no legitimate interest in the information requested. *Id.*

This exemption applies to routine matters of merely internal significance. *Jones*, 41 F.3d at 244 (quoting *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 485 (D.C. Cir. 1980)). This court has upheld the use of this exemption to withhold file numbers and symbols used to identify informants. *Id.* at 244-45 (citing *Kiraly v. FBI*, 728 F.2d 273, 276 n.6 (6th Cir. 1984)). Information that merely has the potential for bringing to light the practices by which an agency collects and processes information does not come within the ambit of the exception. *Abraham & Rose*, 138 F.3d at 1081.

Second, section 552(b)(3) covers matters "specifically exempted from disclosure by statute" when the statute leaves no discretion about the decision to withhold information from the public or establishes specific criteria for withholding particular types of matters. Accordingly, the scope of the inquiry under this exemption is limited: if a statute exempts materials from disclosure and the requested materials fall within that statute's scope, that is the end of the matter. Though not previously addressed in this circuit, courts have unanimously held that Rule 6(e) of the Federal Rules of Criminal Procedure constitutes a statute under section 552(b)(3) of the FOIA so that an agency may withhold grand jury materials. *E.g., Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 n.4 (7th Cir. 1998); *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 235 (1st Cir. 1994); *McDonnell v. United States*, 4 F.3d 1227, 1246-47 (3d Cir. 1993); *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 868 (D.C. Cir. 1981). Rule 6(e)(3) outlines the exceptions to the Rule's general prohibition against disclosure of grand jury materials. Nonetheless, documents identified as grand jury exhibits or containing testimony or other material directly associated with grand jury proceedings fall within the exemption under section 552(b)(3) without regard to whether one of the Rule 6(e)(3) exceptions allows disclosure. *Church of Scientology*, 30 F.3d at 235. Documents created for

reasons independent of a grand jury investigation do not. *Id.* (citing *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9th Cir. 1993)).

Third, section 552(b)(5) exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This provision protects documents that a private party could not discover in litigation with the agency. *Schell v. United States Dep't of Health and Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988) (citations omitted). Courts have construed this exception to preserve the recognized evidentiary privileges, such as the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege. *Klamath Water Users Protective Ass'n*, 121 S. Ct. at 1065-66; *Schell*, 843 F.2d at 939 (citing *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 5 (6th Cir. 1980)). To come within this exception on the basis of the deliberative process privilege, a document must be both "predecisional," meaning it is "received by the decisionmaker on the subject of the decision prior to the time the decision is made," and "deliberative," the result of a consultative process. *Schell*, 843 F.2d at 940 (citing *Parke, Davis & Co.*, 623 F.2d at 6). Although this privilege covers recommendations, draft documents, proposals, suggestions, and other subjective documents that reflect the opinions of the writer rather than the policy of an agency, the key issue in applying this exception is whether disclosure of the materials would "expose an agency's decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* (quoting *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

Fourth, section 552(b)(6) exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We have read this section as establishing a two-

prong inquiry: (1) whether the file includes personnel, medical, or "similar" data; and (2) if so, whether disclosure constitutes a "clearly unwarranted" invasion of privacy. *Heights Cmty. Cong. v. Veterans Admin.*, 732 F.2d 526, 528 (6th Cir. 1984) (citing *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 601-02 (1982)). Under the threshold requirement, the exception applies to any government "records on an individual which can be identified as applying to that individual." *Id.* (quoting *Washington Post*, 456 U.S. at 601-02). Determining whether disclosure works a clearly unwarranted invasion of privacy requires a balancing test under which courts identify the privacy interest at stake and weigh it against the public interest in disclosure. *Id.* at 529. "The central inquiry is whether public access to the information is tantamount to an invasion of privacy; if so we ask whether such an invasion is justified by any countervailing public benefit from disclosure." *Id.* (quoting *Madeira Nursing Ctr., Inc. v. NLRB*, 615 F.2d 728, 730 (6th Cir. 1980)) (alterations omitted). A clear privacy interest exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available. *Abraham & Rose*, 138 F.3d at 1083 (citing *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 500 (1994)).

Fifth, section 552(b)(7) exempts records or information compiled for law enforcement purposes, but only if certain conditions are met. This court has adopted a per se rule under which any documents compiled by a law enforcement agency fall within the first part of the section 552(b)(7) exception. *Jones*, 41 F.3d at 245. This rule applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well. *Abraham & Rose*, 138 F.3d at 1083 (citing *White v. IRS*, 707 F.2d 897, 901 (6th Cir. 1983)). Accordingly, for a law enforcement agency to withhold information under this section, one of the specific provisions of section 552(b)(7) alone need apply. Four of these are relevant:

(1) *Section 552(b)(7)(C).* Information compiled for law enforcement purposes the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy" does not come within the FOIA's disclosure mandate. 5 U.S.C. § 552(b)(7)(C). This court construes this section as requiring a balancing test similar to that conducted under section 552(b)(6). *Jones,* 41. F.3d at 246 (citing *Rose,* 425 U.S. at 372-73).

(2) *Section 552(b)(7)(D).* Section 552(b)(7)(D) excepts records that "could reasonably be expected to disclose the identity of a confidential source." Here, the question is not whether the document is of a type the agency normally treats as confidential, but whether the particular source spoke with an understanding of confidentiality. *United States Dep't of Justice v. Landano,* 508 U.S. 165, 172 (1993). Unless a promise of confidentiality is expressly given, the government is not entitled to a presumption of confidentiality outside of a narrowly defined set of circumstances supporting such an inference, such as the use of a paid informant. *Id.* at 173-79. Although not defined in the Act, the Supreme Court has defined "confidential" in this section as referring to a degree of confidentiality less than total secrecy. *Id.* at 174. If a confidential source is later revealed, we nonetheless restrict public access to documents under this section so long as the informant and the agency intended the identity of the source to remain undisclosed at the time the agency compiled the information. *Jones,* 41 F.3d at 249.

(3) *Section 552(b)(7)(E).* This provision allows the withholding of materials that would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations if such disclosure could reasonably be expected to risk circumvention of the law." This provision, however, only protects techniques and procedures not already well-known to the public. *E.g., Davin v. United States Dep't of Justice,* 60 F.3d 1043, 1064 (3d Cir. 1995) (quoting *Ferri v. Bell,* 645 F.2d 1213, 1224 (3d Cir. 1981)); *Rosenfeld v. United States Dep't of Justice,* 57 F.3d 803, 815 (9th Cir. 1995) (citations omitted).

(4) *Section 552(b)(7)(F).* This section exempts from disclosure material that "could reasonably be expected to endanger the life or physical safety of any individual."

B. Defendants' Reliance on Exemptions

Rugiero claims that the district court erred by failing to analyze the claims of exemption with sufficient specificity and detail as required by the Act. Defendants dismiss this argument as simply rehashing claims of bad faith. The government's position overlooks this court's obligation to review the affidavits, declarations, and Vaughn indices of agencies to ensure compliance with the Act. *Ingle,* 698 F.2d at 265. In none of the orders granting defendants' motions for summary judgment did the district court scrutinize the claims for exemption in the affidavits produced by the agencies. Although the government remains entitled to a presumption of regularity absent a showing of bad faith, the role of the district court is to review the adequacy of the affidavits. *Id.* "If the Government fairly describes the content

of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the government's position." *Id.* (quoting *Cox*, 576 F.2d at 1312). This standard demands that the district court review the affidavits justifying the withholding of documents responsive to a FOIA request against the law governing application of the Act's exemptions. The record gives no indication that the district court did this. Accordingly, we are forced to conclude the district court erred in failing to review the adequacy of the grounds for nondisclosure stated in the affidavits as required by *Ingle*.

Upon review of the agencies' affidavits, we conclude that only one defendant applied incorrect legal standards in withholding some documents responsive to Rugiero's FOIA request. The DEA identified 399 pages of responsive material, redacted 102, and withheld 288 in their entirety. The agency relied on section 552(b)(2) to withhold violator identifiers; on the exception in section 552(b)(7)(C) to withhold identifying information on agents, personnel, and third parties after balancing the privacy interests against public disclosure; and on section 552(b)(7)(F) to withhold information about DEA agents. With respect to these matters, the affidavit adequately describes the content of the material withheld and applies the governing legal standards for nondisclosure under these exceptions properly. The agency's Vaughn index adequately describes responsive documents and the content of material withheld. In applying the exception in section 552(b)(7)(D), relating to confidential sources, however, the DEA's affidavit indicates that the agency withheld information on two types of informants: (1) those assigned an internal "Cooperating Individual Code" after receiving express assurances of confidentiality; and (2) those who received implied assurances of confidentiality pursuant to agency policy,

which treats the "circumstances of the interview itself [as] creat[ing] an atmosphere in which a promise of confidentiality is understood."

Pursuant to *Landano*, the agency properly withheld information on those who received express assurances of confidentiality. In contrast, the affidavit indicates that the DEA has adopted a blanket rule that any informant who has not received an express assurance of confidentiality will be treated as having received an implied promise of confidentiality. *Landano* does not countenance such a uniform policy, requiring instead that the agency assess confidentiality based on the particular circumstances applicable to each source. Accordingly, the DEA has applied an incorrect standard to confidential informants falling in the second category identified in its affidavit. The DEA's Vaughn index fails to distinguish between these types of confidential sources, necessitating review of all documents the DEA has withheld in full or in part based on this exception. On remand, the district court should take whatever measures it deems appropriate to ensure that the DEA has complied with *Landano* in responding to Rugiero's FOIA request, taking into account that a "bald assertion that express assurances were given amounts to little more than recitation of the statutory standard, which we have held is insufficient." *Billington v. United States Dep't of Justice*, 233 F.3d 581, 584 (D.C. Cir. 2000) (citing *Campbell*, 164 F.3d at 30). The DEA cannot rely on conclusory assertions of compliance with *Landano*. Rather, the agency must provide assurances that sources in fact received promises of confidentiality before withholding information under section 552(b)(7)(D).

The remaining defendants properly applied the governing legal standards and described the responsive documents and materials withheld in sufficient detail to warrant summary judgment. We have reviewed the affidavits and Vaughn indices submitted by each component and are satisfied that each has correctly

identified and applied the legal standards governing exemptions from disclosure under the FOIA and described responsive documents with sufficient particularity to allow Rugiero to challenge the withholding of individual documents, as evidenced by the district court's *in camera* review of Document 2 among others.

VII. Segregability

Consistent with its aim of maximum disclosure, the FOIA requires disclosure of "any reasonably segregable" portion of a record that falls within one of the statute's exceptions. 5 U.S.C. § 552(b). In such cases, the redactions are to be indicated on the record produced to the requesting party. *Id.* The agency has the burden to show that portions withheld are not segregable from the disclosed material. *Davin*, 60 F.3d at 1052. Under this principle of segregability, an agency cannot justify withholding an entire document simply because it contains some material exempt from disclosure. *Krikorian v. Department of State*, 984 F.2d 461, 467 (D.C. Cir. 1993) (quotations omitted). Rather, an agency must supply a relatively detailed justification and explain why materials withheld are not segregable. *Id.* (quotations omitted). A district court errs by approving the withholding of an entire document without entering a finding on segregability. *Church of Scientology of Cal. v. United States Dep't of the Army*, 611 F.2d 738, 744 (9th Cir. 1980).

Rugiero urges that the district court erred in failing to require the EOUSA and the DEA to produce all reasonably segregable material in documents withheld in their entirety. Specifically, he objects to the agencies' conclusory assertions of nonsegregability and, because of the government's alleged bad faith, seeks *in camera* review of these materials to assure compliance with the Act.

With respect to the EOUSA's withholding in full of 821 pages of grand jury materials, the district court found that the Vaughn index identifies these documents as containing transcripts of witness testimony, exhibits, and

other materials identifying witnesses. *Rugiero*, 35 F. Supp. 2d at 984. As defendants point out, this finding discharges the district court's obligations under the FOIA so far as these documents are concerned. The EOUSA, however, withheld 888 pages in their entirety, and the district court did not consider the segregability of the remaining documents. The Vaughn index indicates that the EOUSA's decision to withhold many documents in their entirety consists solely of a conclusory statement that they do not contain segregable material. By comparison, the index also lists some documents as containing responsive material that is "so intertwined with other third party and protected material as to be inextricable and nonsegregable." Nowhere does the EOUSA describe the process by which it determined that all reasonably segregable material had been released or state why some materials are not reasonably segregable. *See Davin*, 60 F.3d at 1052. Therefore, we remand Count IV to the district court for further proceedings to determine whether documents withheld in their entirety by the EOUSA contain material that can be reasonably segregated and disclosed. The district court retains discretion to decide whether to undertake this determination based on affidavits, *in camera* review, or some other procedure that strikes the appropriate balance between disclosure and protecting exempted materials.

Similarly, in response to Rugiero's request, the DEA withheld 288 pages in their entirety and released 102 with redactions. The affidavit in support of the DEA's motion for summary judgment simply asserts that none of the withheld material is reasonably segregable. None of the attached supporting exhibits offers any additional explanation regarding segregability. Nor does the extensive Vaughn index suggest that the agency even considered the issue. Therefore, we also remand Count XI for the district court to determine whether any documents withheld in their entirety by the DEA contain segregable material that should be disclosed under the FOIA.

VIII. Conclusion

For the foregoing reasons, we affirm the judgment of the district court in substantial part, reverse in part, and remand for further proceedings (1) to apply the "confidentiality" standard under section 552(b)(7)(D) to documents the DEA withheld in Count XI; and (2) to determine the segregability of documents withheld in their entirety by the DEA and the EOUSA, excluding the 821 pages of grand jury materials withheld pursuant to Rule 6(e) by the latter. On remand, the district court has available all of the tools normally available in FOIA actions to ensure agency compliance with disclosure obligations under the Act. We recognize that our ruling today will not necessarily result in production of these documents in whole or in part to Rugiero. Rather, we seek to ensure agency compliance with the governing legal standards for disclosing information under the FOIA and think that the Act compels this disposition.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

1999 U.S. Dist. LEXIS 4528

PATRICK RUGIERO,
Plaintiff,

v. **CIV. ACTION NO. 97-40520**

UNITED STATES DEPARTMENT OF JUSTICE and
UNITED STATES DEPARTMENT OF TREASURY,
Defendants.

March 9, 1999, Decided
[March 9, 1999, Entered]

DISPOSITION:
[*1] Plaintiff, Patrick Rugiero, take nothing in this action against defendants, and that his July 30, 1997 complaint DISMISSED with prejudice.

COUNSEL:
For PATRICK RUGIERO, plaintiff: Alan C. Applebaum, Southfield, MI. For DEPARTMENT OF JUSTICE, DEPARTMENT OF THE TREASURY, defendants: Charles H. Keen, U.S. Department of Justice, Washington, DC. For DEPARTMENT OF JUSTICE, defendant: William L. Woodard, United States Attorney's Office, Detroit, MI.

JUDGES:
HONORABLE PAUL V. GADOLA, U.S. DISTRICT JUDGE.

OPINION BY:
PAUL V. GADOLA

OPINION:

ORDER

On July 30, 1997, plaintiff, Patrick Rugiero, filed an eleven-count complaint pursuant to the Freedom of Information Act, 5 U.S.C. @ 552 et seq. ("FOIA"). On September 16, 1998, this court entered an order dismissing with prejudice Count III of plaintiff's complaint pursuant to stipulation of the parties. On October 19, 1998, this court entered an order dismissing with prejudice Counts I, II, V, VI, VII, VIII, IX and XI of plaintiff's complaint. In that order, this court also ordered certain relief pursuant to the claims contained in Count IV of the complaint, but dismissed the remaining portion of Count IV with prejudice. On January 22, 1999, [*2] this court entered an order dismissing with prejudice Count X of plaintiff's complaint.

Accordingly, this court having reviewed the submissions of the parties and being fully advised in the premises, Count IV being the only count remaining in plaintiff's complaint, and the substantive claims contained in Count IV having been disposed of by this court's prior orders in this matter, IT IS HEREBY ORDERED that the remaining claims contained in Count IV of plaintiff's July 30, 1997 complaint are DISMISSED with prejudice.

SO ORDERED.

Dated: 3/9/99

PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

JUDGMENT

This action came before this court, the Honorable Paul V. Gadola, District Judge presiding, and the issues having been fully presented and the court being fully advised in the premises, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Patrick Rugiero, take nothing in this action against defendants, and that his July 30, 1997 complaint be **DISMISSED** with prejudice.

SO ORDERED.

Dated: 3/9/99

PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

35 F. Supp. 2d 977; 1998 U.S. Dist. LEXIS 19573;
82 A.F.T.R.2d (RIA) 7393

PATRICK RUGIERO,
Plaintiff,

v. **CIV. ACTION NO. 97-40520**

UNITED STATES DEPARTMENT OF JUSTICE and
UNITED STATES DEPARTMENT OF TREASURY,
Defendants.

October 19, 1998, Decided
October 19, 1998, Filed
[October 19, 1998, Entered]

DISPOSITION:
[**1] Defendants' motions for summary judgment pursuant to Fed. R. Civ. P. 56 GRANTED in part and DENIED in part.

COUNSEL:
For PATRICK RUGIERO, plaintiff: Alan C. Applebaum, Southfield, MI. For DEPARTMENT OF JUSTICE, DEPARTMENT OF THE TREASURY, defendants: Charles H. Keen, U.S. Department of Justice, Washington, DC. For DEPARTMENT OF JUSTICE, defendant: William L. Woodard, United States Attorney's Office, Detroit, MI.

JUDGES:
HONORABLE PAUL V. GADOLA, U.S. DISTRICT JUDGE.

OPINION BY:
PAUL V. GADOLA

OPINION:

[*979] MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Before the court are two separate motions for summary judgment filed by defendants, United States Department of Justice and United States Department of Treasury. This court held oral argument on the instant motions on September 15, 1998. At that time, this court took the majority of issues related to the motions for summary judgment under advisement. However, on September 16, 1998, this court did enter an order disposing of a number of matters. This court is now prepared to rule on the remaining issues raised in the motions for summary judgment. For the reasons set forth below, this court will grant defendants' motions in part, and deny them in part.

Factual Background

This is an action brought under the Freedom of Information Act, 5 U.S.C. @ 552 (FOIA). FOIA provides for disclosure of information to the public unless the requested records are exempt under one or more of [**2] the nine statutory exemptions. *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976). The plaintiff is Patrick Rugiero, and the defendants are the United States Department of Justice and Department of Treasury.

Plaintiff submitted FOIA requests seeking disclosure of any and all documents about himself from several components of the Department of Justice and Department of Treasury. Those components include the Criminal Division of the Department of Justice (DOJ-Crim. Div.), the Detroit Field Division of the Federal Bureau of Investigation (FBI-Detroit), Headquarters of the Federal Bureau of Investigation (FBI-HQ), Executive Office of United States Attorneys (EOUSA), United States Secret Service (USSS),

United States Marshal Service (USMS), United States Customs Service (USCS), Bureau of Alcohol, Tobacco and Firearms (ATF), and the United States Drug Enforcement Administration (DEA). Plaintiff also claims that he submitted FOIA requests to the Internal Revenue Service (IRS) and Tax Division of the U.S. Department of Justice (DOJ-Tax).

The components responded to plaintiff's requests by searching their records to determine whether any [**3] responsive documents existed. DOJ-Crim. Div. (Count I) located two responsive documents. It released one of the documents to plaintiff with certain information redacted pursuant to 5 U.S.C. @ 552(b) (6) and (b)(7)(C). It determined that the other document originated in EOUSA, so it referred the document to that component for processing and direct response to plaintiff. EOUSA reviewed the document and released it in full to plaintiff.

FBI-Detroit (Count II) located one document with five pages responsive to plaintiff's request, and released to plaintiff one page in its entirety and the remaining four pages with certain information redacted under 5 U.S.C. @ 552 (b)(7)(C). FBI-HQ (Count III) searched its records and found no pertinent records responsive to plaintiff's FOIA request.

EOUSA (Count IV) located 1, 211 pages of responsive documents. Of this total, it released 292 pages to plaintiff in their entirety and 31 pages with portions withheld. It withheld 888 pages in their entirety (821 of which were grand jury materials). EOUSA withheld the information pursuant to the FOIA exemptions under 5 U.S.C. @ 552(b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), (b)(7)(E), and (b)(7)(F). EOUSA [**4] also determined that an additional 175 pages in its possession had originated with DEA and an additional 73 pages had originated with ATF, so it referred those pages to DEA and ATF for FOIA processing and direct response to plaintiff.

USSS (Count V) searched its records and found no pertinent records responsive to plaintiff's FOIA request.

USCS (Count VI) located one responsive document consisting of two pages, which it [*980] released to plaintiff with certain information redacted pursuant to 5 U.S.C. @ 552(b)(2) and (b)(7)(C).

USMS (Count VII) located 46 documents responsive to plaintiff's request. It withheld none of these documents in their entirety, released one document to plaintiff in its entirety, and released 43 documents to plaintiff with certain information redacted pursuant to 5 U.S.C. @ 552(b)(2), (b)(7)(C), and (b)(7)(E).

USMS determined that the remaining two documents had originated in EOUSA, so it referred those document to EOUSA for disclosure determination and direct response to plaintiff.

ATF (Count VIII) located 105 pages responsive to plaintiff's FOIA requests, and released all responsive document to plaintiff with information redacted pursuant to 5 U.S.C. @ 552(b)(7)(c), [**5] (b)(7)(D), and (b)(7)(F).

The Internal Revenue Service (Count IX) claimed that it found no responsive documents.

DOJ-Tax (Count X) claims that plaintiff never properly complied with the administrative procedures required under FOIA, and thus it has not produced any documents related to a request by plaintiff.

DEA (Count XI) located 399 pages of responsive document. It released 100 pages to plaintiff with portions redacted, and withheld the remaining 299 pages in their entirety. DEA asserts that it redacted or withheld information pursuant to the FOIA exemptions set forth in 5 U.S.C. @ 552(b)(2), (b)(7)(C), (b)(7)(D), and (b)(7)(F).

In the present suit, plaintiff seeks to compel disclosure of documents or information withheld by the components on grounds that they are exempt under FOIA. Count I pertains to the FOIA request made to DOJ-Crim.Div.; Count II pertains to FBI-Detroit; Count III

pertains to FBI-HQ; Count IV pertains to EOUSA; Count V pertains to the USSS; Count VI pertains to the USCS; Count VII pertains to the USMS; Count VIII pertains to ATF; Count IX pertains to the IRS; Count X pertains to DOJ-Tax; and Count XI pertains to DEA.

Discussion

1. Standard for [6] summary judgment pursuant to Rule 56**

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the non-moving party's case on which the non-moving party would bear the burden of proof at trial. *Martin v. Ohio Turnpike Commission*, 968 F.2d 606, 608 (6th Cir. 1992); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In considering a motion for summary judgment, the court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the non-moving party. *60 Ivy Street Corporation v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). The court is not required or permitted, however, to judge the evidence or make findings of fact. Id. at 1435-36. [**7] The moving party has the burden of showing conclusively that no genuine issue of material fact exists. Id. at 1435.

A fact is "material" for purposes of summary judgment where proof of that fact would have the effect of establishing or refuting an essential element of the cause of action or a defense advanced by the parties. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). In other words,

the disputed fact must be one which might affect outcome of the suit under the substantive law controlling the issue. *Henson v. National Aeronautics and Space Administration,* 14 F.3d 1143, 1148 (6th Cir. 1994). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. Accordingly, where a reasonable jury could not find that the non-moving party is entitled to a verdict, there is no genuine issue for trial and summary judgment is appropriate. *Feliciano v.* [*981] *City of Cleveland,* 988 F.2d 649 (6th Cir. 1993).

Once the moving party carries its initial burden of demonstrating that no genuine issues of material fact are in dispute, the burden shifts to the non-moving party to present specific [**8] facts to prove that there is a genuine issue for trial. To create a genuine issue of material fact, the non-moving party must present more than just some evidence of a disputed issue.

As the United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986):

> There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the [non-moving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted); see also *Celotex,* 477 U.S. at 322-23; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Consequently, the non-moving party must do more than raise some doubt as to the existence of a fact; the non-moving party must produce evidence that would be sufficient to require submission of the issue to the jury.

Lucas v. Leaseway Multi Transp. Serv., Inc., 738 F. Supp. 214, 217 (E.D. Mich. 1990), *aff'd*, 929 F.2d 701 (6th Cir. 1991).

2. FOIA

The FOIA statute provides in relevant part: [**9]

> Each agency, upon request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. @ 552(a)(3).

However, not all public records are subject to production under the Act. Subsection (b) of the statute sets forth a number of exemptions to disclosure of records:

> (b) This section does not apply to matters that are-
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> (2) related solely to the internal personnel rules and practices of an agency;
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> (3) specifically exempted from disclosure by statute . . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
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(5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly [**10] unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for

> law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the [*982] law, or [**11] (F) could reasonably be expected to endanger the life or physical safety of any individual;
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> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

5 U.S.C. @ 552(b).

Defendants claim that the withheld or redacted records in this case are exempt from disclosure under subsections (2), (3), (5),(6),(7)(C),(7)(D), (7)(E), and (7)(F) of subsection 552(b). Under the statute, the burden is on the governmental agency to show that the materials sought may be withheld due to an exemption. *See Vaughn v. United States*, 936 F.2d 862, 866 (6th Cir. 1991); 5 U.S.C. @ 552(a)(4)(B).

3. Defendants' motion as it pertains to Counts I-VIII and XI

a. Count I

In response to the request that gives rise to Count I of plaintiff's complaint, the DOJ-Crim. Div. disclosed one document in full, and one cover sheet with material redacted. Plaintiff's argument that the DOJ-Crim. Div.

performed an inadequate search for documents rests primarily on the fact that the redacted cover sheet contains the language, "YOU ARE ADVISED THAT THE FILE DESCRIBED BELOW HAS BEEN [**12] CLOSED." Essentially, plaintiff contends that the fact that a file has been closed necessarily indicates that the file has been opened. Plaintiff argues simply that there must have been more than one document in addition to the cover sheet in the file. Accordingly, plaintiff contends that the search must have been inadequate.

In response, the government has submitted the declaration of Linda J. Joachim, which indicates that, indeed, the only document contained in the file at issue was the one document submitted to plaintiff in response to his FOIA request. Against such a declaration, plaintiff's unsubstantiated conjecture that the file must have contained additional documents will not, without more, enable plaintiff's claim to survive a motion for summary judgment.

Plaintiff also argues that this court should review in camera the redacted portions of the cover sheet to determine whether the information redacted is, in fact, exempt under the statute.[1] However, courts faced with similar claims have clearly held that a court should not engage in an in camera review of documents if the court can resolve the question of the adequacy of the governmental agency's search for responsive [**13] documents by examining the Vaughn Index[2] and other affidavits and declarations of the

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1 This court notes that plaintiff raises this argument repeatedly throughout his responses to defendants' motions for summary judgment. (See, e.g., discussion of Counts II, VI, VII, VIII and XI, infra.)

2 "Vaughn Index" is a term derived from *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974). The index usually consists of a detailed affidavit, 35 F. Supp. 2d 977, *983; 1998 U.S. Dist. LEXIS 19573, **14; the purpose of which is to permit the court system effectively and efficiently to evaluate the factual nature of disputed information. See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S. Ct. 471, 474 n. 2, 107 L. Ed. 2d 462 (1989).

government agency that conducted the search. *See, e.g., Ingle v. United States Dep't of Justice*, 698 F.2d 259, 264-66 (6th Cir. 1983). In *Ingle*, the Sixth Circuit quoted with approval the following passage from *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1312 (8th Cir. 1978):

> 'A court's primary role . . . is to review the adequacy of the affidavits and other evidence presented by the Government in support of its position . . . . If the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.'

[*983] *Ingle*, 698 F.2d at 265. Unless there is evidence that contradicts the Government's affidavits, or some other evidence of bad faith on the part of the agency, this court will not accept plaintiff's invitation to conduct an in camera review [**14] of documents in this case. See *Silets v. United States Dep't of Justice*, 945 F.2d 227, 231 (7th Cir. 1991)(holding specifically that courts should require evidence of bad faith, as opposed to mere assertions of bad faith before engaging in an in camera review of documents); *Vaughn v. United States*, 936 F.2d 862, 868-69 (6th Cir. 1991)(holding that sufficiently clear affidavits are adequate to substantiate claims of FOIA exemptions in the absence of evidence to the contrary or evidence of bad faith on the part of the agency).

[**15] With respect to Count I, plaintiff has not offered any evidence of agency bad faith, or any other evidence that would suggest an in camera review of the redacted document would be appropriate. Rather, plaintiff

merely contends that an in camera review is "necessary and is requested by plaintiff to test [defendant's] claims of exemption." (Pl.'s Resp. at 4.) At oral argument, plaintiff's counsel repeatedly indicated that plaintiff believes he is unable to trust that the government has adequately addressed his requests. Counsel relied heavily on *Jones v. Federal Bureau of Investigation*, 41 F.3d 238 (6th Cir. 1994), in which the court noted that "even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue." *Id.* at 242. The court went on to note that "where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of Vaughn affidavits alone." Id. at 242-43 (emphasis added).

However, [**16] *Jones* is distinguishable from this case because in *Jones*, the Sixth Circuit made a specific finding that there was strong evidence of bad faith. The court even went so far as to note that "infringements of civil liberties seemed well documented . . . ." *Id.* at 243. In this case, plaintiff has come forth with no substantial showing of such evidence. Without some substantial evidence of the type required by *Ingle*, and recognized in *Jones*, this court will decline plaintiff's request to conduct an in camera review of the documents related to Count I.

Accordingly, this court will grant defendants' motion for summary judgment with respect to Count I.

b. Count II

In response to the FOIA request that gives rise to Count II of plaintiff's complaint, FBI-Detroit located one 48-page memorandum, five pages of which it asserts are responsive to plaintiff's request. Accordingly, FBI-Detroit released one page in its entirety and four pages with information redacted pursuant to exemption @ 502(b)(7)(C). Plaintiff contends that "it is beyond the scope of believability

that 43 pages contain so much personally identifying information as to be exempt from disclosure under [**17] @ 502(b)(7)(C)." (Pl.'s Resp. at 5.) In response to that contention, defendants have submitted an affidavit which indicates that, in fact, the other 43 pages of this document do not pertain to plaintiff at all, and as such, those pages are non-responsive to plaintiff's request.

Plaintiff has not come forth with any evidence to suggest FBI-Detroit conducted its search in bad faith. Nor has plaintiff produced any substantial evidence or argument that would suggest that FBI-Detroit's characterization of those 43 pages as non-responsive to plaintiff's FOIA request is incorrect. Accordingly, this court will decline to examine the memorandum in camera, and this court will grant defendants' motion for summary judgment with respect to Count II.

c. Count IV

In response to the FOIA request giving rise to Count IV, EOUSA released approximately 300 pages in their entirety, and 31 pages with portions redacted. EOUSA claims it withheld 888 documents in their entirety, 821 of which were grand jury materials. Plaintiff first claims, and defendant concedes, that the 31 redacted pages were issued without page numbers, making it very difficult for plaintiff to compare the documents to the [**18] Vaughn Index. Plaintiff has [*984] requested that defendant be required to re-release those 31 pages with page numbers so that plaintiff may more easily evaluate the claims of exemption. This court has indicated that such a request appears reasonable, and accordingly, this court entered an order on September 16, 1998 requiring EOUSA to re-release those pages.

Next, plaintiff claims that defendants have failed to demonstrate that the withheld documents related to the grand jury proceedings are actually exempt from disclosure because defendants have failed to show that the documents

would reveal the scope and inner workings of the grand jury. See *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 235 (1st Cir. 1994). Moreover, plaintiff contends that defendants did not specifically address the question of whether any of the purported grand jury documents were segregable.

Contrary to plaintiff's contention, the various affidavits, declarations and portions of the Vaughn Index indicate that the defendants did, in fact, consider whether any documents related to this request are segregable. Moreover, in Item 1 of its Vaughn Index, EOUSA clearly set forth exactly [**19] what kinds of documents were contained in the 821 pages of grand jury materials. It is true that *Church of Scientology* makes clear that, despite the fact that grand jury materials are often completely exempt, there is a distinction between grand jury exhibits and testimony on the one hand, and business records or similar documents created for purposes independent of grand jury investigations which have legitimate uses unrelated to the substance of the grand jury proceedings on the other. However, as the Vaughn Index in this case clearly indicates, the 821 pages of grand jury materials in this case are comprised of transcripts of witness testimony and actual exhibits, as well as other documents that specifically name grand jury witnesses. Pursuant to *Church of Scientology*, all such documents are exempt under FOIA.

Plaintiff next takes issue with EOUSA's withholding of a number of specific documents:

i. Document (2)

First, plaintiff claims that he is entitled to possession of a copy of what has been labeled "Document (2)." which is a letter from the federal prosecutor regarding discussions with jurors and third parties about threats of intimidating conduct directed [**20] at and reported by several jurors during plaintiff's criminal trial. It is undisputed that

plaintiff's criminal trial counsel, N.C. Deday LaRene, received a copy of this correspondence. Despite the fact that this document was once disclosed to plaintiff's attorney, there are clear privacy interests that weigh in favor of withholding this letter pursuant to (b)(7)(C). In order to resolve the issue, this court ordered defendant to produce the document for an in camera inspection.

Upon a thorough review of Document (2), this court finds that plaintiff is entitled to possession of the document. While this court does recognize that certain privacy interests are implicated by the release of the document, the fact that the Assistant United States Attorney already disclosed the information contained in this document to plaintiff's criminal trial counsel suggests to this court that those privacy interests do not outweigh plaintiff's right to the information contained in Document (2). Accordingly, this court will direct EOUSA to release a copy of this document to plaintiff.

ii. Document (3)

Second, plaintiff asserts he is entitled to a copy of what has been labeled as "Document [**21] (3)," which is a letter from an Assistant U.S. Attorney to an FBI Special Agent regarding possible jury tampering. Defendants assert that the letter constitutes protected attorney work product. While plaintiff asserts there is a distinction between factual and deliberative work product, the law is clear that for the purposes of a (b)(5) exemption, both factual and deliberative work product are exempt from release under FOIA. *See Norwood v. Federal Aviation Admin.*, 993 F.2d 570, 576 (6th Cir. 1993). Accordingly, this court rejects plaintiff's argument with respect to this document.

iii. Document (5)

Third, plaintiff objects to the withholding of what has been labeled as "Document (5)," which consists of a communication between EOUSA and the U.S. Probation department. Plaintiff contends that the Probation Department relied on the document when it prepared plaintiff's presentence report, and as such, plaintiff contends that he is entitled to it. This court has noted that, to the extent Document (5) was used as an aid in the preparation of the presentence report which this court consulted prior to sentencing plaintiff, plaintiff has a strong interest in ensuring that the contents [**22] of the document are accurate. Accordingly, this court ordered EOUSA to submit Document (5) for an in camera inspection.

Upon review of Document (5), this court is satisfied that the document was not used as an aid in the preparation of plaintiff's presentence report. Accordingly, this court finds that EOUSA properly withheld Document (5).

iv. Documents (9) and (10)

Finally, plaintiff asserts he is entitled to what have been labeled as "Documents (9) and (10)," which are two pieces of correspondence from an Assistant U.S. Attorney to attorneys for third parties. Plaintiff contends that these letters relate to an investigation of his attorney, N.C. Deday LaRene. Plaintiff sought an in camera inspection of the documents to determine whether LaRene is in fact the subject of the documents. Given the slight burden that would result, this court ordered production of Documents (9) and (10) for in camera review.

Upon review of Documents (9) and (10), this court is satisfied that LaRene is not the subject of those pieces of correspondence. Therefore, this court finds that EOUSA properly withheld Documents (9) and (10).

Accordingly, for the reasons set forth above, this [**23] court will grant in part and deny in part defendants' motion summary judgment as it relates to Count IV.

d. Count V

In response to the request that gives rise to Count V of plaintiff's complaint, the USSS searched its records and found no responsive documents. Plaintiff contends that a document he received in the context of another request reveals that the USSS had an "ongoing investigation" against him. Accordingly, plaintiff asserts that the USSS should not be able to claim that it has no documents related to his request. However, a review of that document suggests only that Rugiero's name was mentioned in the context of an investigation report prepared by Treasury-ATF. Defendants have submitted a declaration which indicates that the investigation related to that document was directed at someone other than plaintiff. Accordingly, the document is not sufficient to produce a genuine issue of material fact as to whether USSS has responsive documents that it did not disclose to plaintiff. Therefore, this court will grant defendants' motion for summary judgment as to Count V.

e. Counts VI, VII, VIII and XI

With respect to the requests related to these Counts, plaintiff [**24] again merely asks for an in camera review of the relevant documents to determine whether defendants' claims of exemption are well-founded. Again, plaintiff has produced no evidence to suggest that there is any bad faith on the part of the agencies involved. Accordingly, pursuant to *Ingle* and *Silets*, this court rejects plaintiff's invitation to conduct an in camera review. Therefore, this court will grant defendants' motion for summary judgment with respect to these counts.

4. Defendants' motion as it pertains to Counts IX and X

a. Count IX

Count IX relates to a request made to the Internal Revenue Service. In response to that request, the IRS claimed that it had no responsive documents. Plaintiff contends, however, that the federal tax return records of plaintiff were introduced as evidence by the government in the course of prosecuting plaintiff. Accordingly, plaintiff contends that the response by the IRS is disingenuous, and they should be required to run another search. However, as counsel for defendant indicated at oral argument, the specific search requested by defendant was for any [*986] documents related to any IRS Criminal Investigation Division investigation [**25] of him between the years of 1984 and 1993. Plaintiff has not been charged with tax evasion, and the mere fact that the government introduced his federal tax returns in the course of prosecuting him for non-tax-related offenses does not suggest that there must have been a Criminal Investigation Division investigation. Therefore, this court will grant defendant's motion for summary judgment with respect to Count IX.

b. Count X

Count X arises out of a request made to the Department of Justice-Tax Division. Defendants' motion for summary judgment as to Count X is based on the claim that plaintiff did not comply with the administrative process required under FOIA when he made his request. Specifically, defendants contend that the Tax Division never received the initial FOIA request dated June 5, 1995. Moreover, defendants claim that plaintiff never sent the required identity verification form. In response, plaintiff points out that the initial FOIA request, dated June 5, 1995, with the clear heading that it was addressed to the Tax

Division, is attached as an Exhibit to defendants' motion for summary judgment with respect to Counts I-VIII and XI. In addition, plaintiff has submitted [**26] an affidavit in which he asserts that he executed the identity verification form and forwarded same to the Tax Division on October 26, 1995. Given these circumstances and in the interests of judicial economy, on September 16, 1998 this court ordered the Tax Division to accept an identity verification form from plaintiff and immediately begin processing his request.

Therefore, this court will deny defendants' motion for summary judgment as it relates to Count X.

Conclusion

For the reasons set forth above, this court having reviewed the submissions of the parties and being fully advised in the premises,

IT IS HEREBY ORDERED that defendants' motions for summary judgment pursuant to Fed. R. Civ. P. 56 are **GRANTED** in part and **DENIED** in part in accordance with the terms set forth in this opinion.

IT IS FURTHER ORDERED that Counts I, II, V, VI, VII, VIII, IX and XI of plaintiff's complaint are **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that Count IV is **DISMISSED** in part with prejudice in accordance with the terms set forth in this opinion.

IT IS FURTHER ORDERED that EOUSA shall release a copy of "Document (2)" to plaintiff within ten [**27] (10) days of the date of entry of this order.

SO ORDERED.

Dated: 10/19/98

PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

Case No. 99-1608

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Patrick Rugiero,
Plaintiff-Appellant,

v.

United States Department of Justice;
Department of Treasury,
Defendants-Appellees.

Filed: September 7, 2001
[Entered: September 7, 2001]

Before: KRUPANSKY, BATCHELDER, and GILMAN, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

\s\ _____
Leonard Green, Clerk